90-1454

Supreme Court, U.S.
FILED
MAR 7 1991
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

FREDERICK NATHAN VANN,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI

ROBERT W. RITCHIE
Counsel of Record
RITCHIE, FELS & DILLARD, P.C.
606 West Main Avenue
Post Office Box 1126
Knoxville, TN 37901-1126
(615) 637-0661
Attorney for Petitioner

QUESTION PRESENTED

Is it the law that a person does not have an expectation of privacy in his principal residence, which residence was built by him on property purchased by him, on which he makes payments, in which he keeps the majority of his belongings, and for which he possesses a key, simply because title to the residence is not in his name and because he owns a second residence?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF THE CASE	4
REASON FOR GRANTING THE WRIT	14
CONCLUSION	26

APPENDIX

Majority Opinion of the Court of Criminal Appeals, Filed April 26, 1990	1a
Minority Opinion of the Court of Criminal Appeals, Filed April 26, 1990	30a
Order of the Supreme Court Denying Permission to Appeal, Filed December 10, 1990	43a

TABLE OF CASES AND OTHER AUTHORITIES

PAGE

CASES

Jones v. United States,
362 U.S. 257 (1960) 20

Katz v. United States,
389 U.S. 347 (1967) 23

Minnesota v. Olson,
___ U.S. ___, 110 S. Ct. 1684
(1990).....24

Rakas v. Illinois,
439 U.S. 128 (1978) 14,20,22

Rawlings v. Kentucky,
448 U.S. 98 (1980) 22

Roberson v. United States,
165 F.2d 752 (6th Cir. 1948) 23,24

United States v. Jeffers,
342 U.S. 48 (1951) 24

United States v. Salvucci,
448 U.S. 83 (1980) 22

United States v. Soule,
908 F.2d 1032 (1st Cir. 1990) 25

OTHER AUTHORITIES

28 U.S.C. § 1257(a) 2

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

FREDERICK NATHAN VANN,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI

Petitioner Frederick Nathan Vann respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Tennessee Court of Criminal Appeals

entered on April 26, 1990, and the denial of permission to appeal by the Tennessee Supreme Court entered on December 10, 1990.

OPINIONS BELOW

The opinions of the Tennessee Court of Criminal Appeals are reprinted in the appendix. See majority opinion at 1a and minority opinion at 30a. The order of the Tennessee Supreme Court denying permission to appeal is likewise reprinted in the appendix. App. at 43a.

JURISDICTION

The judgment of the Tennessee Court of Criminal Appeals was entered on April 26, 1990. Petitioner's application for permission to appeal was denied by the Tennessee Supreme Court on December 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment 4. The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner Nathan Vann was convicted on February 20, 1988, in the Morgan County, Tennessee, Criminal Court of the offenses of first degree murder and arson. He was sentenced to life imprisonment for the first degree murder conviction and to five years imprisonment for the arson conviction. The arson sentence was to be served concurrently with the first degree murder sentence.

Prior to trial, Vann filed a motion to suppress numerous pieces of evidence which were discovered during a four-day warrantless search of a home located on Adcock Hollow Road in Morgan County, Tennessee. Among the evidence discovered during the four-day search and later introduced at trial was a masonry hammer alleged by the prosecution to be the murder weapon, photographs of various holes

in a sheetrock wall of the Adcock Hollow residence which depicted the masonry hammer being held next to the holes to illustrate that the hammer was used to make the holes, cuttings from the sheetrock wall, a telephone, a necklace, an earring, a shotgun, and numerous photographs of the house and objects found in the house.

A hearing on the motion to suppress was held on February 8, 1988, and was conducted in two phases. The first portion of the hearing was devoted entirely to the question of whether or not petitioner Vann had "standing" to contest the four-day search of the Adcock Hollow residence. The second portion of the hearing was devoted to determining whether the warrantless search itself was valid.

During the first phase or the standing phase of the suppression hearing, only two witnesses were called to testify.

Petitioner testified on his own behalf, and Ms. Melissa Perry, the deceased's sister, testified on behalf of the state.

Vann testified that he purchased the Adcock Hollow property from his uncle in 1980 for $4,500. After purchasing the property, he constructed a road into and built a barn on the property. Sometime later, Vann and the deceased, Emma Justice, built a new home on the Adcock Hollow property. Petitioner initially spent $12,000 of his own money on building supplies in order to begin work on the new home. Thereafter, he made monthly payments of approximately $430 on a building materials loan which had been taken out in Emma Justice's name. Petitioner Vann and Ms. Justice performed all the physical labor required in building the house.

Petitioner further testified that on February 21, 1987, the date that Emma

Justice died, title to the Adcock Hollow property was not in his name. Petitioner explained he had previously transferred title of the residence into Ms. Justice's name because he thought he was going to be named in a civil lawsuit.

Vann also testified that on February 21, 1987, his principal place of residence was the Adcock Hollow Road residence. He told the court that he kept a key to the Adcock Hollow residence, and aside from the living room suit and refrigerator, he had purchased all of the furniture in the Adcock Hollow home. Petitioner further stated that he kept a variety of clothes at the Adcock Hollow residence, which included shirts, pants, overalls, insulated underwear, socks, t-shirts, coats, short pants, and sweat pants. Finally, he testified that he kept his

canceled checks and tax papers at the Adcock Hollow residence.

Petitioner was asked numerous questions about a second residence located in the Oliver Springs area. He testified that he and Ms. Justice did in fact have a barn apartment in Oliver Springs and that he and Ms. Justice sometimes stayed at the Oliver Springs apartment. He told the court that he did keep some clothes at the Oliver Springs residence but that the majority of his clothes and other personal items were kept at the Adcock Hollow residence.

After petitioner testified concerning his expectation of privacy in the Adcock Hollow residence, the state called to the witness stand Ms. Melissa Perry, the sister of the deceased. Ms. Perry told the court that she was serving as the administrator of Emma Justice's estate, and that in inventorying the Adcock Hollow home

following the fire, she had discovered two or three men's shirts, a couple of pairs of men's jeans, and a pair of men's cut-off jeans which she discarded. Further, Ms. Perry informed the court that she did not find other men's clothing at the Adcock Hollow home. Ms. Perry also testified that she discovered papers at the Adcock Hollow home which had petitioner Vann's name on them, and that she and her family had destroyed these papers. Finally, Ms. Perry told the court that Mr. Vann had lived at the Adcock Hollow residence "off and on" and that she had not visited the Adcock Hollow residence in January or February of 1987, the two months prior to the death of Emma Justice.

At the conclusion of petitioner Vann's and Ms. Perry's testimony, the trial court said, "[A]t this point, from what is before the court, the court will have to

conclude that he [petitioner] does have standing to raise the objection."

Following the trial court's ruling that petitioner had standing to contest the search, the suppression hearing continued in order to determine if the search of the Adcock Hollow home was a valid search. At the close of the suppression hearing, the trial court denied the petitioner's motion to suppress, concluding that the warrantless four-day search of the Adcock Hollow home was valid under the consent and exigent circumstances exceptions to the warrant requirement.

In a non-unanimous decision, Tennessee's Court of Criminal Appeals upheld the trial court's decision to overrule the petitioner's motion to suppress. However, the Court of Criminal Appeals majority affirmed the trial court based not upon the trial court's finding that the search and

seizure were valid under the consent and exigent circumstances exceptions[1], but rather upon its own determination that petitioner Vann lacked a reasonable expectation of privacy in the Adcock Hollow residence.

In reaching its conclusion that petitioner lacked an expectation of privacy in the Adcock Hollow residence, the Court of Criminal Appeals majority said, "We hold that the facts . . . are consistent with the defendant's status as an occasional overnight visitor, not a resident of the Adcock Hollow house." The Court of Criminal Appeals majority went on to find that such "occasional overnight visitors" do not have

---

[1]The majority found that the consent and exigent circumstances exceptions cited by the trial court did not validate the warrantless search for and seizure of evidence from the Adcock Hollow home. Thus, they determined that the warrantless four-day search of the home was illegal.

a legitimate expectation of privacy in a home.

In a separate opinion, the Court of Criminal Appeals minority agreed with the majority that the four-day search of the Adcock Hollow residence was illegal, but it did not agree that petitioner Vann lacked a reasonable expectation of privacy in the Adcock Hollow home. The Court of Criminal Appeals minority determined that substantial evidence existed supporting the trial court's ruling that petitioner had a legitimate expectation of privacy and that the Court of Criminal Appeals majority had improperly denied the petitioner his right to contest the illegal search. In accordance with its opinion, the Court of Criminal Appeals minority concluded that the motion to suppress should have been granted and that the judgment should be set aside.

On September 13, 1990, petitioner Vann filed with the Tennessee Supreme Court an application for permission to appeal the Tennessee Court of Criminal Appeals' decision. The Tennessee Supreme Court denied the petitioner's application on December 10, 1990.

REASON FOR GRANTING THE WRIT

NATHAN VANN'S CLAIM OF A LEGITIMATE EXPECTATION OF PRIVACY IN THE ADCOCK HOLLOW HOME MUST BE RECOGNIZED BECAUSE HE PRESENTED OVERWHELMING, UNREBUTTED EVIDENCE TO SUBSTANTIATE HIS CLAIM.

The United States Supreme Court should grant this petition for a writ of certiorari because the Tennessee Court of Criminal Appeals improperly applied the United States Supreme Court's standard for determining when an individual has the "capacity to claim the protection of the Fourth Amendment." That standard, as was first enunciated in *Rakas v. Illinois*, 439 U.S. 128 (1978), provides that "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place." *Id.* at 143. Nathan Vann unequivocally established that he possessed

such an expectation of privacy in the Adcock Hollow home.

The Tennessee Court of Criminal Appeals improperly applied the *Rakas* standard because it based its determination not upon petitioner Vann's expectation of privacy in the home but rather upon the fact that title to the home was not in his name and upon the fact Mr. Vann possessed a second residence. In focusing its attention on title and the existence of a second residence, the Court of Criminal Appeals ignored numerous privacy factors about which there was no dispute and which, under the law previously established by this Court, unequivocally established the petitioner's expectation of privacy.

Two witnesses testified at the hearing on the issue of expectation of privacy: Mr. Vann testified on his own behalf, and Melissa Perry (the deceased's

sister) testified on behalf of the state. Both Vann and Perry offered testimony which tended to support the trial court's conclusion that Vann possessed a legitimate expectation of privacy in the Adcock Hollow home. The unrebutted and uncontradicted testimony demonstrated the following:

> (1) Petitioner bought the Adcock Hollow property from his uncle in 1980 for $4,500.
>
> (2) After purchasing the property in 1980, petitioner built a road and a barn on the property.
>
> (3) Petitioner and Emma Justice built a home on the Adcock Hollow property.
>
> (4) Petitioner and Emma Justice performed the physical labor required in building the home.
>
> (5) Petitioner initially spent $12,000 on building supplies in order to begin work on the home.

(6) Petitioner made monthly payments of approximately $430 on a building materials loan taken out in Emma Justice's name.

(7) Petitioner's principal place of residence on February 21, 1987, was the Adcock Hollow Road residence.

(8) Petitioner had a key to the Adcock Hollow Road residence.

(9) Aside from the living room suit and the refrigerator, all other furniture in the Adcock Hollow home had been purchased by petitioner Vann.

(10) Petitioner kept cancelled checks and tax papers at the Adcock Hollow residence.

(11) Petitioner kept clothes at both the Adcock Hollow residence and at the Oliver Springs residence, but the majority of the clothes that he wore every day were kept at the Adcock Hollow Road residence.

(12) Petitioner possessed shirts and pants which were hanging in a closet in the Adcock Hollow home.

(13) Petitioner kept insulated underwear and socks at the Adcock Hollow residence.

(14) Petitioner kept three to five pairs of overalls hanging in the bedroom closet at the Adcock Hollow home.

(15) Petitioner kept coats at the Adcock Hollow residence.

(16) Petitioner kept short pants and sweat pants at the Adcock Hollow residence.

(17) When petitioner stayed at the Oliver Springs residence, Emma Justice stayed there with him.

(18) Petitioner kept the majority of his personal items at the Adcock Hollow residence.

(19) Melissa Perry found men's clothing in the closets at the Adcock Hollow residence.

(20) Melissa Perry disposed of the men's clothing which was found at the Adcock Hollow residence.

(21) Melissa Perry found papers at the Adcock Hollow home which had petitioner Vann's name on them.

(22) Melissa Perry and her family destroyed the papers bearing petitioner Vann's name which were found in the Adcock Hollow home.

(23) Melissa Perry never visited the Adcock Hollow residence in January or February of 1987, the two months preceding the death of Emma Justice.

The portions of Ms. Perry's testimony cited by the Court of Criminal Appeals as being demonstrative of Mr. Vann's lack of an expectation of privacy were statements she made concerning the amount of clothing she found in the Adcock Hollow home following the fire and her knowledge of Mr.

Vann's residency at the Adcock Hollow home. With regard to the clothing discovered at the Adcock Hollow residence following the fire, Ms. Perry told the court that she only found two or three shirts, a couple of pairs of jeans, and a pair of cut-off jeans. And, when asked about her knowledge of Mr. Vann's residency at the Adcock Hollow home, Ms. Perry stated, "He lived there off and on." The Court of Criminal Appeals' reliance upon these two statements as evidence of Mr. Vann's lack of an expectation of privacy is, however, incomprensible in light of the fact that any clothing found in the home could only support Mr. Vann's expectation of privacy[2] and in light of Ms. Perry's own

---

[2]In *Jones v. United States*, 362 U.S. 257, 730 (1960), petitioner, who was found to possess a legitimate expectation of privacy in the apartment of his friend (*see Rakas v. Illinois*, 439 U.S. 128 (1978) at 143), only kept one suit and one shirt at the apartment.

testimony that she had not visited the Adcock Hollow home in the two months preceding Ms. Justice's death.

The foregoing examination of the evidence adduced at the hearing on the motion to suppress demonstrates that petitioner Vann possessed a legitimate expectation of privacy in the Adcock Hollow home. The trial court acknowledged this expectation, but the Court of Criminal Appeals rejected it, choosing instead to base its ruling upon Mr. Vann's lack of legal ownership of the home and upon the fact that he possessed a second residence. Based upon this reasoning, the Court of Criminal Appeals came to the conclusions that Mr. Vann was nothing more than an "occasional overnight visitor" to the Adcock Hollow home and that such visitors did not possess expectations of privacy. These

arguments and conclusions, however, cannot withstand scrutiny.

The fact that petitioner Vann had previously placed title to the Adcock Hollow home in Emma Justice's name is not, in and of itself, a legitimate basis upon which to deny him his Fourth Amendment protections. *See, Rakas v. Illinois*, 439 U.S. 128, 152 (1978)("In considering the reasonableness of asserted privacy expectations, . . . no single factor invariably will be determinative."). While "ownership . . . is undoubtedly one fact to be considered" *Rawlings v. Kentucky*, 448 U.S. 98, 109 (1980), it "is not a proxy for determining whether the owner has a Fourth Amendment interest . . ." *United States v. Salvucci*, 448 U.S. 83, 91 (1980). Mr. Vann transferred title of the property to Emma Justice because he thought he was going to be named in a civil lawsuit, and he feared

he might lose his home. Such action on his part not only explains why the house was not in his name but also demonstrates that he was attempting to protect his interest in the home, an interest society would no doubt "recognize as reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967).

Likewise, petitioner's Fourth Amendment protections are not eroded by the simple fact that he possessed a second residence. "It is not at all unusual for a man to own two different houses, each of which is used by him at intervals as his home." *Roberson v. United States*, 165 F.2d 752, 754 (6th Cir. 1948). Nathan Vann's uncontradicted testimony revealed that his primary residence was the Adcock Hollow home, and that when he did stay at the Oliver Springs barn apartment, Emma Justice stayed there with him. To hold that such a factual situation somehow erodes one's

legitimate expectation of privacy in either residence would surely result in the loss of "the full purpose of the immunity from unreasonable search and seizure. . . ." *Id.* at 754.

Finally, the Court of Criminal Appeals' conclusions that petitioner was nothing more than an "occasional overnight visitor" and that such visitors have no expectations of privacy simply cannot prevail. "[S]ociety recognizes that a houseguest has a legitimate expectation of privacy in his host's home," *Minnesota v. Olson*, ___ U.S. ___, 110 S. Ct. 1684, 1689-90 (1990), even if that guest comes and goes at his own choosing. *See, United States v. Jeffers*, 342 U.S. 48 (1951)(Unstated premise that Jeffers had a legitimate expectation of privacy in his two aunts' hotel room where he had a key to the room and was allowed to enter the room at will for various

purposes.); and *United States v. Soule*, 908 F.2d 1032, 1035 (1st Cir. 1990)("Defendant, who lived at 255 Broadway on weekends and kept clothing and other personal belongings there, had demonstrated a reasonable expectation of privacy in those premises.")

Tennessee's Court of Criminal Appeals denied Nathan Vann his right to claim the protection of the Fourth Amendment. They denied him this right primarily because title to the Adcock Hollow property was not in his name and because he owned a second residence. Such a denial, in light of the abundance of evidence which tended to demonstrate Mr. Vann's connection with and expectation of privacy in the Adcock Hollow home, must be considered erroneous.

CONCLUSION

For all the foregoing reasons, petitioner Nathan Vann respectfully requests that the United States Supreme Court grant the petition for writ of certiorari.

Respectfully submitted,

ROBERT W. RITCHIE
Counsel of Record
RITCHIE, FELS & DILLARD, P.C.
606 West Main Avenue
Post Office Box 1126
Knoxville, TN 37901-1126
(615) 637-0661
Attorney for Petitioner

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH 1989

STATE OF TENNESSEE,	)	
	)	
Appellee	)	No. 45
	)	
	)	MORGAN COUNTY
	)	
v.	)	Honorable E.
	)	Eugene Eblen, Judge
	)	
FREDERICK NATHAN VANN,	)	(First degree
	)	murder, arson)
Appellant	)	

For the Appellee:	For the Appellant:
JAMES W. MILAM Assistant A.G. Nashville, Tennessee	ROBERT W. RITCHIE DAVID M. ELDRIDGE Knoxville, Tennessee
D. ROGER DELP Assistant District Attorney General Loudon, Tennessee	
FRANK A. HARVEY Assistant District Attorney General Lenoir City, Tennessee	

Opinion Filed: APR 26 1990

AFFIRMED

MARTHA CRAIG DAUGHTREY
Judge

OPINION

The defendant, Frederick Nathan Vann, was convicted of first degree murder and arson. He was sentenced to life imprisonment on the first charge and to a concurrent five year term on the second. On appeal, Vann challenges (1) the trial court's refusal to suppress evidence found at the crime scene, (2) the trial court's refusal to give a specially requested jury instruction, (3) the admission of a "life photograph" of the victim, and (4) the sufficiency of the evidence to support his conviction. For the reasons discussed below, we affirm the defendant's conviction.

A fire was discovered at the Adcock Hollow Road residence of Emma Justice by a neighbor on Saturday morning, February 21, 1987. He notified the fire department and called an ambulance, then returned to Ms. Justice's home to find out if anyone was

inside. He discovered the body of the victim, Emma Justice, on the living room couch.

Fire officials put out the fire, and the sheriff arrived shortly thereafter. The sheriff suspected foul play in Emma Justice's death because of the bruises on her body. He and his deputies spent the next three to five days searching and seizing evidence from the victim's partially burned house, without any attempt to obtain a search warrant.

Defendant Vann was Emma Justice's boyfriend. They had been seeing each other for about four years before her death. During this period, Vann had sold the property on Adcock Hollow Road to Emma Justice and helped her build the house on it. But the relationship had apparently become stormy. On Friday evening, February 20, 1987, the night of the victim's death,

friends saw several violent confrontations between the defendant and the victim while they were at a local nightspot, the Reactor Room Lounge, and later at a friend's apartment. At one point Vann grabbed her arm, at another he repeatedly pulled her hair, and later he punched her in the eye. One witness said that Vann appeared to have been drinking heavily, and Vann himself admitted that he had been drinking throughout the day.

According to medical evidence, Emma Justice died later that same night as a result of a blow to the head. The defendant admitted at trial that he had knocked the victim down during an argument at her house, where he had followed her after the altercation at the friend's apartment. He also admitted that when he realized she was dead, he set fire to the house to destroy evidence of how she died.

However, he denied that he had intended to kill her.

I. Motion to Suppress

Prior to trial, the defendant filed a motion to suppress evidence seized from Emma Justice's residence. The trial court overruled the motion to suppress, holding that the defendant had consented to the search and that it was justified on the basis of exigent circumstances. We agree with the result reached by the trial judge on the question of suppression, but not with the reasons he gave for reaching that result. Instead, we hold that the defendant lacked standing to object to the police conduct in this case.

A defendant objecting to a warrantless search bears the burden of proving that he has a privacy interest in the premises searched sufficient to give him grounds to object. *State v. White*, 635

S.W.2d 396 (Tenn.Crim.App. 1982). The defendant in this case claims that the standing issue was conclusively settled by the trial court's ruling in his favor on this point during the hearing on the motion to suppress. We cannot agree.

In the first place, the trial judge failed to state on the record the findings of fact essential to his legal determination that the defendant had standing, in violation of Tennessee Rule of Criminal Procedure 12(e). Midway through the pretrial suppression hearing the trial judge announced, "[A]t this point, from what is before the Court, the Court will have to conclude that [the defendant] does have standing to raise the objection." However, the trial judge never made the requisite findings of fact to support this conclusion. A ruling that a defendant has standing is a conclusion of law, based on factual and

legal queries, rather than a finding of fact. *See California v. Ciraolo*, 476 U.S. 207, 211 (1986) (the question of standing is resolved by using a two-pronged legal test, evaluating the defendant's subjective expectation of privacy, and the reasonableness of that expectation). Instead of making a factual decision, *e.g.*, that the defendant owned the property searched, or that the defendant in fact had a subjective expectation of privacy in the Adcock Hollow home, the trial judge short-circuited the inquiry, jumped to the next step, and announced his conclusion that the defendant had standing.

Contrary to the position taken in the dissent filed with this opinion, we are not reweighing the facts presented at the motion hearing and coming to a different finding of fact. Rather, we are arriving at a different legal conclusion than that

reached by the trial judge, based on the facts as presented. We conclude from our review of the transcript that the evidence presented at the hearing on the defendant's motion to suppress does not support the trial court's legal conclusion that Vann had standing to contest the search. When the trial court's decision in a suppression hearing is contradicted by a preponderance of the evidence, this court may reverse that decision. *State v. Killebrew*, 760 S.W.2d 228 (Tenn.Crim.App. 1988).

As noted above, the inquiry in a suppression hearing begins with the question of whether the defendant asserting a Fourth Amendment violation has a reasonable expectation of privacy in the premises searched. *State v. Burton*, 751 S.W.2d 440, 445 (Tenn. Crim. App. 1988); *Rakas v. Illinois*, 439 U.S. 128 (1978). No such objectively reasonable expectation emerged

from the evidence presented at the suppression hearing here. The defendant had conveyed the property on Adcock Hollow Road to the victim. Title to the property was in the victim's name alone. The victim and the defendant had apparently built the house on that property with their own labor, but Vann asserted that he paid for the building supplies. The record shows, however, that Emma Justice had taken out a bank loan for approximately $20,000 for building supplies. There was no evidence to support the defendant's allegation that he had made all the payments on this note, other than his self-serving assertion to that effect.

Vann carried a key to the victim's Adcock Hollow residence and insisted that it was his home. But he also had an apartment of his own, referred to in the record as the "barn residence." Aside from the defendant's unsupported claims, there is no

other evidence to support the contention that he lived at the house on Adcock Hollow Road. He could not list more than ten items of clothing he owned which were stored at the Adcock Hollow residence. Moreover, Emma Justice's sister testified that as the administrator of the victim's estate, she had run an inventory and had discovered only a few pieces of the defendant's clothing at the house after the fire. She further testified that at most Vann had lived there "off and on."

We hold that the facts outlined above are consistent with the defendant's status as an occasional overnight visitor, not a resident of the Adcock Hollow house. Such a visitor does not have a sufficient interest in the premises to object to a search. It was up to the defendant to establish his interest in the premises searched, *State v. Roberge*, 642 S.W.2d 716

(Tenn. 1982), and we conclude that he did not establish an objectively reasonable expectation of privacy.

Our conclusion in this regard is bolstered by a recent federal case that is instructive on the level of interest necessary to show a reasonable expectation of privacy. In *United States v. Sangineto-Miranda*, 859 F.2d 1501 (6th Cir. 1988), the court delineated two kinds of visitors to a residence and analyzed which of them has a sufficient privacy interest in the premises to object to a subsequent warrantless search. A regular visitor is one with a key to the premises, unrestricted access, and the right to stay overnight there, even without the owner's knowledge or consent. Typically, such a visitor keeps clothes and other items at the premises, expects to exclude others from the premises, and has a protectible privacy interest in those

premises. On the other hand, a casual visitor, without a key and without the right to exclude others from the premises, does not have any right to object to a search thereof. A casual visitor's legitimate presence by itself is insufficient to establish standing.

Here, the defendant falls between the two alternatives delineated in *Sangineto-Miranda, supra*, but his interest seems more clearly similar to that of the casual visitor. There was no evidence presented at the suppression hearing that he had any right to exclude others from the house, or that he had permission to stay in the house overnight without the owner's knowledge. Although he had a key to the house, this factor, even when coupled with a few items of clothing in the house, is insufficient to give rise to a protectible privacy interest in the house and its

contents. We thus conclude that the defendant lacked standing to contest the search and that his motion to suppress should have been overruled.

Instead, the trial court held that the warrantless search and seizure in this case was valid, under the consent exception and the exigent circumstances exception to the warrant requirement. As noted above, we disagree with this analysis, because it is not supported by the evidence.

The informed and voluntary consent necessary to validate an otherwise unreasonable warrantless search must be given before the search takes place. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The validity of a consent search rests on the assumption that without the subject's consent, the search would not occur. Otherwise, consent is meaningless.

In this case, the trial judge inferred consent from defendant Vann's statement to the police that "any way he could help [the police], he would." This statement, however, was not given before the search took place. In fact, Vann made the statement sometime during the evening of February 21, 1987. But the Morgan County sheriff and his deputies had begun searching the Adcock Hollow residence at 10:00 that morning. Clearly, the defendant could not retroactively consent to a search that had already occurred, even if his general, rather ambiguous statement could be interpreted as a consent to search. Consequently, we hold that this aspect of the trial court's holding is in error.

The trial court held that in addition to the defendant's purported consent, exigent circumstances also permitted the warrantless search of the

Adcock Hollow residence. This ruling, too, is unsupported by the evidence. Among the exigent circumstances recognized as exceptions to the search warrant requirement are emergency, such as a crime in progress or a person needing help inside the premises, *McDonald v. U.S.*, 335 U.S. 451 at 454 (1948); hot pursuit of a fleeing criminal, *Warden v. Hayden*, 387 U.S. 294 (1967); or the prevention of loss or destruction of contraband or other evidence, *Ker v. California*, 374 U.S. 23 (1963). None of these circumstances is present here. Review of this issue is hampered by the fact that the trial court did not specifically set forth the factual basis for its ruling that exigent circumstances were present, as required by Tennessee Rule Criminal Procedure 12(e). Nonetheless, it is clear from even a cursory review of the record

that no evidence of any accepted example of exigent circumstances was offered or proven.

In their briefs, both the state and the defense rely on *Mincey v. Arizona*, 437 U.S. 385 (1978), to support their respective positions on the issue of exigent circumstances. The state cites *Mincey* for the proposition that police may make an initial search of a homicide scene to determine whether victims in need of assistance or perpetrators are on the premises. While *Mincey* does not make a quick canvass of the area for other victims unreasonable, it does declare a protracted search long after any possible victims have been removed to be impermissible. A description of the search involved in *Mincey* is instructive:

> Their search lasted four days, during which period the entire apartment was searched, photographed, and diagrammed. The

> officers opened drawers, closets, and cupboards, and inspected their contents; they emptied clothing pockets; they dug bullet fragments out of the walls and floors; they pulled up sections of the carpet and removed them for examination. Every item in the apartment was closely examined and inventoried, and 200 to 300 objects were seized. In short, Mincey's apartment was subjected to an exhaustive and intrusive search. No warrant was ever obtained.

Id. at 389.

The *Mincey* court held such a search to be unjustified based on the claimed exigent circumstances and declared that "a four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search." *Id.* at 393.

The search involved in this case is strikingly similar to the search that the United States Supreme Court held unconstitutional in *Mincey v. Arizona*, *supra*. It lasted at least three days and perhaps as long as five days, during which time numerous objects were seized. Among these were 60 sections of wallboard, which formed two collective exhibits. Photographs were taken of the entire house, and objects were seized from such diverse locations as a dresser drawer in the master bedroom, the top shelf of a closet in another bedroom, and basement stairs behind a false wall. The scope of the search and the extent of the seizures appear to us to be well within the kind of extensive, disruptive searches proscribed by *Mincey*, *supra*.

Michican v. Tyler, 436 U.S. 499 (1978), is also cited by both the state and defense and is also factually similar.

There, firefighters extinguished a fire at the defendant's store, and some four hours later the fire chief and a detective returned to the store, searched it, and seized objects as evidence of arson. Almost a month later, a police officer returned and searched even more thoroughly. The United States Supreme Court adopted the wording of the Michigan Supreme Court in holding the later searches impermissible, saying that "'if the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply.'" *Id.* at 508, quoting 399 Mich. 564 at 584, 250 N.W.2d 467 at 477 (1977). The Court found no exceptions to the warrant requirement to be applicable and therefore held the warrantless search unreasonable.

Although the *Tyler* court held the initial search constitutional, that search is factually distinguishable from the search

at issue here. In *Tyler*, the search on the morning of the fire was held to be a continuation of the first entry onto the premises for the purpose of fighting the fire. Here, the sheriff conceded that his purpose in entering the Adcock Hollow residence, even immediately after the fire was extinguished, was to investigate the murder which he believed had occurred. His entry was not, therefore, analogous to the initial search in *Michigan v. Tyler*.

The Tennessee case most clearly applicable to the instant case, *State v. Tyler*, 598 S.W.2d 798 (Tenn. Crim. App. 1980), supports our conclusion in this case. In *Tyler*, this court held that while officers could enter the scene of a shooting to find and help the victim, arrest the perpetrator, and make the premises safe, they could not then begin a warrantless search. At that point, the court reasoned,

the officers could easily post a guard and obtain a search warrant. That analysis is clearly applicable here. Once the Adcock Hollow residence was canvassed for more victims or the perpetrator, a guard could have been posted while a search warrant was obtained.

On the facts of *State v. Tyler*, this court held that the trial court's error in admitting the fruits of an unconstitutional search was harmless. We have previously determined that the defendant in this case lacked standing to contest the validity of the search of the victim's home and that the trial court properly denied the defendant's motion to suppress for this reason, if not for the reason announced on the record. Ordinarily, we would therefore depart from the route taken by the court in *Tyler* and forego the application of harmless error analysis to

the facts at hand. However, in view of the disagreement with the majority's position on the standing issue reflected by the dissenting opinion in this case, and the emphasis placed by the dissent on the masonry hammer seized from Emma Justice's home, we think it prudent to determine whether the invalid search and seizure is, alone, a sufficient ground on which to order a new trial. We conclude that it is not.

Of course, in order to hold that constitutional error is not reversible error, we must find that it is harmless beyond a reasonable doubt, under the rule laid down in *Chapman v. California*, 386 U.S. 18, 24 (1967). In this case, we reach that conclusion without difficulty.

The only specific item of evidence which seems to concern our dissenting colleague is the masonry hammer and pictures of wallboard showing holes presumably made

by the hammer. The dissent characterizes the introduction of this evidence as "error of prejudicial dimensions," but the record fails to establish that the error is actually reversible. As the dissent notes, the only relevance of the masonry hammer at trial was its status as the possible murder weapon. But the pathologist was unable to say whether the trauma to the victim's head that caused her death was made by the flat surface of the masonry hammer or by an injury caused when the victim fell and hit her head on the brick hearth.

In contrast to this piece of purely speculative testimony concerning the role of the masonry hammer in Emma Justice's death, there is overwhelming proof of the defendant's guilt. It includes testimony from several witnesses who saw the defendant physically assault the victim on several occasions on the night of her death; strong

circumstantial evidence that he was the last person to see her alive; and his thoroughly damaging confession that he had delivered what turned out to be the fatal blow to her head (either directly or indirectly), that he had set fire to the house in an attempt to cover up his deed, and that he had fled from the burning house and left Emma Justice's body inside, hoping that it would be destroyed.

From all this, it is not difficult to conclude, beyond a reasonable doubt, that the jury would have found the defendant guilty of first degree murder even if the masonry hammer, or for that matter, any of the illegally seized evidence, had been suppressed prior to trial and never admitted for the jury's consideration. Hence, we conclude that any error committed by the trial judge on the question of suppression

had no effect on the outcome of the trial and was no more than harmless error.

II. Jury Instruction

The defendant next cites as error the trial court's refusal to give a specially requested jury instruction. However, the instruction requested by the defendant is nothing more than the charge actually given by the judge, as recast according to the defendant's version of the facts of this case. While the accused in a criminal case is entitled to affirmative instruction on every issue raised by the evidence, *Myers v. State*, 206 S.W.2d 30 (Tenn. 1947), he is not thereby entitled to have the judge apply the law of those instructions to the facts as the defendant sees them. The interpretation of the facts introduced at trial is strictly within the province of the jury, and is not to be invaded or influenced by the trial judge.

Our review of the charge given by the trial court in this case indicates that the jury instructions were proper and fully in accord with the nature of the crime charged and the evidence introduced at trial. In such a situation, the trial court's refusal to give a specially requested instruction is not reversible error. *State v. Strong*, 608 S.W.2d 599 (Tenn. Crim. App. 1980).

III. Admissibility of Photograph

The defendant next contends that the admission of a "life photograph" of the victim, that is, one taken before her death, was prejudicial error on the part of the trial court and requires reversal of the defendant's conviction. Both parties cite *State v. Dicks*, 615 S.W.2d 126 (Tenn. 1981), for the proposition that, generally speaking, such a picture of a homicide victim should not be admitted at trial. In

Dicks, the life photograph of the victim had no relevance to the issues at trial, other than to show contrast with a photograph of the corpse. We find the present case to be more closely analogous to *State v. Harries*, 657 S.W.2d 414 (Tenn. 1983). There, the admission of a photograph of the murder victim, pictured together with a witness to the killing, was upheld as relevant to the issue of the defendant's identification of the witness, and his belief that he had seen the witness leave the premises before the murder occurred. Here, the photograph of Ms. Justice was admitted for the purpose of helping a witness to identify her as the woman with defendant Vann at the Reactor Room bar the night of her death. This is a permissible purpose for admitting such a photograph, and there is no reason to believe that introduction of the photograph of the victim caused the jury to feel any

particular sympathy or prejudice. *See id.* at 421.

IV. Sufficiency of the Evidence

Finally, the defendant claims that his convictions for first degree murder and arson are legally unsupported by the evidence adduced at trial. The defendant includes in his brief an account of the events leading up to the death of Ms. Justice and the partial burning of the Adcock Hollow residence, as he interprets those events. It is well-settled in Tennessee, however, that the appellate court may not reweigh the evidence presented at trial. *State v. Grace*, 493 S.W.2d 474 (Tenn. 1973). Rather, in the event of a conviction, this court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements necessary for the

conviction, beyond a reasonable doubt. Tenn. R. App. P. 13(e); *State v. Williams*, 657 S.W.2d 405 (Tenn. 1983). As we have previously noted, we conclude that the evidence of guilt is not only legally sufficient to support the verdict, but indeed, that it overwhelmingly establishes the defendant's guilt.

For the reasons set out above, we affirm the judgment of the trial court.

/s/
Martha Craig Daughtrey, Judge

CONCUR:

Joe B. Jones, Judge

/s/
Adolpho A. Birch, Judge

IN THE COURT OF CRIMINAL APPEALS

OF TENNESSEE, AT KNOXVILLE

MARCH 1989 SESSION

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	C.C.A. No. 45
	)	
vs.	)	Morgan County
	)	
FREDERICK NATHAN VANN,	)	
	)	
Appellant.	)	April 26, 1990

OPINION CONCURRING IN PART
AND DISSENTING IN PART

Based upon the facts contained in the record, I am of the opinion that the appellant possessed a reasonable expectation of privacy in the residence located on Adcock Hollow Road, and the warrantless search of the residence and seizure of the masonry hammer did not fall within one of the recognized exceptions to the warrant requirement. Thus, the trial judge's denial of the appellant's motion to suppress

evidence constituted plain error. For this reason, I would set aside the judgment of conviction and remand this cause for a new trial on the merits. I concur with my colleagues in the treatment of the remaining issues.

When the allegations contained in a motion to suppress evidence, obtained through a warrantless search and seizure, entitle an accused to an evidentiary hearing, the accused has the initial burden of proving by a preponderance of the evidence (a) he has a legitimate expectation of privacy in the place searched or the property seized,[1] (b) the identity of the

---

[1]*State v. Roberge*, 642 S.W.2d 716, 718 (Tenn. 1982); *State v. White*, 635 S.W.2d 396, 399 (Tenn. Crim. App. 1982); *See State v. Roberts*, 755 S.W.2d 833, 837 (Tenn. Crim. App. 1988); *State v. Burton*, 751 S.W.2d 440, 445-446 (Tenn. Crim. App. 1988).

items he seeks to suppress as evidence,[2] and (c) the items were seized without a warrant.[3] Once the accused establishes these prerequisites, the burden then shifts to the State to establish by a preponderance of the evidence that the search and resulting seizure were justified by one of the recognized exceptions to the warrant requirement.[4]

In this case the State contested the appellant's expectation of privacy in the residence on Adcock Hollow Road. At the commencement of the suppression hearing, the

---

[2]*State v. Burton*, supra; *State v. Johnson*, 705 S.W.2d 681, 683 (Tenn. Crim. App. 1985).

[3]*State v. Burton*, supra.

[4]*Coolidge v. New Hampshire*, 403 U.S. 443, 454-455, 91 S. Ct. 2022, 2032, 29 L.Ed.2d 564, 576 (1971); *State v. Hughes*, 544 S.W.2d 99, 101 (Tenn. 1976), app. after rem. 588 S.W.2d 296, 301 (Tenn. 1979).

parties presented evidence, on the question of whether the appellant had a reasonable expectation of privacy in the residence. The trial judge concluded that the appellant had a reasonable expectation of privacy in the residence, and, thus, had standing to challenge the warrantless search.

The appellant testified that he purchased the land on Adcock Hollow Road from his uncle before he met the victim. He built the residence himself and paid for the first $12,000 of building materials. He subsequently conveyed the property to the victim because he thought he was going to be sued. The victim subsequently borrowed $20,000 to pay for the materials required to complete the residence. The appellant further testified that he and the victim were cohabiting in a temporary shelter on the land while he built the residence. Once the house was completed, they moved into it.

He also testified that he paid the house notes. Some of the personal property contained inside the residence was owned by the appellant, some was owned by the victim, and other personal property had been purchased jointly. His personal and business records were inside the residence. When the victim died, the residence was the appellant's principal place of abode. He lived there, he had a key to the residence, and some of his clothing was there.

The appellant had also purchased twenty-six (26) acres of land in Oliver Springs, a community situated in Anderson County. He subsequently built a barn on the land. An apartment was built in the barn's loft. The appellant testified that he occasionally stayed in the barn apartment, particularly when he and the victim had an argument. On occasion the victim also stayed at the barn with the appellant. They

intended to sell the property on Adcock Hollow Road and build a residence on the Oliver Springs acreage.

The victim's sister testified for the State. She related that the appellant lived with her sister "off and on." She did not visit the residence the month prior to her sister's death, but she did visit in February, the month her sister was killed. The appellant was not home when she visited. However, there is nothing to refute the testimony of the appellant that he was living with the victim during the month of February. When the residence was inventoried, the victim's sister found men's clothing in the closet of a bedroom. All of his clothing was not located in the residence. The witness admitted that there were "papers" found in the residence, but she didn't "look at them that well." The "papers," cancelled checks, bank documents,

and tax documents, were either given to the sheriff or destroyed. Some of these papers contained the appellant's name.

As can be seen from the foregoing summary of the facts, the question of whether the appellant had a reasonable expectation of privacy hinged upon the credibility of the two witnesses.[5] The trial judge obviously accredited the testimony of the appellant. In ruling on this issue, the trial court stated: "[T]he Court will have to conclude that he [the appellant] does have standing to raise the objection." At the conclusion of the suppression hearing, the trial judge did not comment on this issue. He ruled that there was justification for the warrantless search.

---

[5]*State v. Killebrew*, 760 S.W.2d 228, 233 (Tenn. Crim. App. 1988).

It has long been established in this jurisdiction that the rulings of a trial judge and the judgment he entered at the conclusion of a motion to suppress has the weight of a jury verdict.[6] Like a jury, the trial judge, as the trier of fact, must assess the credibility of each witness, determine the weight and value to be given the witnesses, and resolve any conflict in the testimony of the witnesses.[7] Consequently, the judgment entered by the trial judge at the conclusion of a suppression hearing is conclusive and binding upon an appellate court unless (a) the facts contained in the record

---

[6]*State v. Killebrew*, 760 S.W.2d 228, 233 (Tenn. Crim. App. 1988); *State v. Roberts*, 755 S.W.2d 833, 837 (Tenn. Crim. App. 1988); *State v. Jenkins*, 733 S.W.2d 528, 532 (Tenn. Crim. App. 1987); *State v. Yarbro*, 618 S.W.2d 521, 524 (Tenn. Crim. App. 1981).

[7]*State v. Killebrew*, supra at 233; *State v. Yarbro*, supra at 524.

preponderate against the judgment or (b) the trial judge has misapplied the applicable principles of law.[8] Since my distinguished colleagues concede that the search of the Adcock Hollow Road residence was unreasonable within the meaning of the Fourth Amendment to the United States Constitution and Article I, § 7 of the Tennessee Constitution, appellate review in this case is limited to a determination of whether the evidence contained in the record preponderates against the trial judge's judgment.

In determining whether the evidence adduced at the suppression hearing preponderates against the rulings of the trial judge and the judgment he enters, this

---

[8]*State v. Moore*, 775 S.W.2d 372, 374 (Tenn. Crim. App. 1989); *State v. Killebrew*, supra; *State v. Roberts*, supra; *State v. Jenkins*, supra; *State v. Turnbill*, 640 S.W.2d 40, 45-46 (Tenn. Crim. App. 1982).

Court may not reweigh or reevaluate the evidence. Nor can this Court substitute its inferences for those drawn by the trial judge as the trier of fact. As in jury cases, this Court should limit its consideration to the evidence which tends to support the judgment. If there is material evidence to support the trial judge's rulings and judgment, this Court is required to affirm the judgment.

In concluding that the evidence contained in the record "preponderates against the trial court's ruling that Vann had standing to contest the search," my colleagues have abandoned the time tested rules governing appellate review of suppression issues. A close reading of the record reveals that the majority has reassessed the credibility of the witnesses, redetermined the weight and value to be given the testimony of the witnesses, and

resolved the conflicts in the evidence to support the result reached. Moreover, the majority opinion reveals that my colleagues have failed to limit their consideration to the evidence tending to support the trial judge's finding that the appellant had standing--an expectation of privacy in the residence located on Adcock Hollow Road.

I am of the opinion that the failure of the trial court to suppress the masonry hammer and the photographs of the hammer being held next to holes in a wall constituted error of prejudicial dimensions, and the appellant is entitled to a new trial.

The pathologist testified that the victim's cause of death was blunt trauma to the head. He opined that the flat surface of the hammer "could have caused" the injury to the victim's brain, but he "couldn't tell" whether the hammer was used to inflict

the fatal blow. On the other hand, the pathologist agreed that the fatal injury could have been caused by the victim hitting her head on the brick hearth when she fell. At another point he stated he did not completely discard this theory when determining the cause of death. However, he stated this theory was unlikely.

The State introduced six photographs of various holes in a wall of the residence with the hammer being held next to the holes to illustrate that the hammer was used to make the holes. During summation the State contended the hammer was the murder weapon and used the hammer to illustrate how it was used to inflict the fatal blow.

The admission of the masonry hammer into evidence permitted the prosecution to argue that the victim died as a result of being struck with the hammer--

not as a result of striking her head against the hearth, the appellant's theory of defense. This provided the basis for a conviction of murder. If the hammer had been suppressed as evidence, the jury could easily have found the defendant guilty of a lesser included offense, namely, involuntary manslaughter or voluntary manslaughter.

I am of the opinion that the admission of the hammer and the photographs depicting the hammer being held next to the holes in the wall more probably than not affected the verdict of the jury.

I would reverse the judgment of the trial court and remand this cause for a new trial on the merits.

/s/
JOE B. JONES, JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	
v. CCA No. 45	)	MORGAN COUNTY
	)	
FREDERICK NATHAN VANN,	)	(Filed Dec. 10, 1990)
	)	
Appellant.	)	

O R D E R

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM